IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner United Air Lines, Inc. (hereinafter "United") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered April 26, 1976 in Case No. 75-1481, *Carolyn J. Evans* v. *United Air Lines, Inc.*

OPINIONS BELOW.

The Memorandum Opinion of the District Court for the Northern District of Illinois dated April 9, 1975 is officially unreported, but is unofficially reported at 12 FEP Cases 287. A copy is appended hereto at Appendix, p. A1. The first opinion of the Court of Appeals dated January 29, 1976, is officially unreported, but is unofficially reported at 12 FEP Cases 288.

A copy is attached at Appendix, p. A3. The opinion of the Court of Appeals after rehearing is reported at 534 F. 2d 1247 (7th Cir., 1976). A copy is attached at Appendix, p. A13.

JURISDICTION.

The final judgment of the Court of Appeals was dated and entered April 26, 1976. Respondent's petition for rehearing was granted April 6, 1976. United's petition for rehearing with suggestion for rehearing *en banc* was denied June 7, 1976 (Appendix, p. A21). Jurisdiction is conferred on this Court by 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Does the reemployment of a former employee with new date-of-hire seniority under a neutral seniority system permit the resurrection of that employee's time-barred claim for loss of seniority and pay arising from termination of that employee's prior employment?

Are the collateral or lingering *effects* of a prior act of discrimination *in themselves* acts of discrimination against an employee, permitting the filing of a charge at any time in the future regardless of how long ago the prior act of discrimination occurred?

STATUTE INVOLVED.

Title VII of the Civil Rights Act of 1964 (hereinafter, the "Act"), 42 U. S. C. § 2000e, *et seq.*, specifically Section 706(d) thereof (42 U. S. C. § 2000e-5(d)).[1] Section 706(d) is set forth in its entirety at Appendix, p. A22.

1. Prior to the 1972 amendments (P. L. 92-261), the time within which charges were required to be filed was ninety days under Section 706(d) of the Act. Effective March 24, 1972, Section 706(d) was relettered 706(e) and the ninety days time limit within which to file charges was extended to 180 days. Evans' resignation and rehire in this case occurred before the 1972 amendments became effective.

STATEMENT OF THE CASE.

This is an action brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, *et seq.* by Carolyn J. Evans (hereinafter "Evans"), a former and subsequently rehired stewardess with United, to recover seniority and back pay lost as a result of her separation from employment as a stewardess in February of 1968. Jurisdiction was based on Section 706(f), 42 U. S. C. § 2000(e)-5(f), of the Act.

Evans was first hired by United as a stewardess in November, 1966. In February, 1968, Evans involuntarily resigned from United in anticipation of her marriage and pursuant to United's then-existing "no-marriage" rule that applied to stewardesses.[2] At the time of her resignation, all aspects of her employment relationship terminated, including seniority, pay, vacations, travel passes, etc. Evans did not protest her involuntary resignation or loss of these employment benefits by filing a charge with the Equal Employment Opportunity Commission ("EEOC") or any state agency at any time during the next four years.

On February 16, 1972, Evans applied and was accepted for employment by United as a new stewardess. She was sent to the same training school as other new hires and was graduated March 16, 1972. She commenced work as a new stewardess with a seniority date reflecting her date of hire in 1972, the same as other new hires with whom she graduated. In all respects, Evans was treated as a new hire and granted the same benefits and conditions of employment as other new hires.

On February 21, 1973, five years after her resignation in 1968 and approximately one year after her rehire as a new stewardess, Evans—for the first time—filed a charge of discrimination under Title VII complaining, in substance, that United unlawfully terminated her in February, 1968 and cur-

2. United discontinued its policy of requiring stewardesses to remain unmarried on November 7, 1968.

rently refused to restore to her the seniority she lost when her resignation was accepted in 1968. On August 29, 1974, the EEOC issued Evans a "right to sue" letter and, on September 4, 1974, this lawsuit was filed in the District Court.

In her complaint, Evans alleged that she had been discriminated against on the basis of sex when United, by reason of its "no-marriage" rule, forced her to resign her employment as a stewardess in 1968. Her complaint also alleged that the effects of this discriminatory discharge were continuing since United, when it subsequently hired her in 1972, hired her as a new employee with new seniority and did not restore her old seniority. Evans sought to avoid the application of any time limitations for her failure to file any previous charge of discrimination by asserting that, because of her new employment and the application of United's admittedly neutral date-of-hire seniority system which did not restore her previous seniority, she was suffering the effects of the 1968 discrimination and a "continuing" discrimination now existed.

United took the position that timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to filing a civil action under Title VII. Evans had not filed a charge of discrimination with the EEOC until February 21, 1973—five years after the termination of her prior employment and seniority—over four years after United eliminated its no-marriage rule—and a year after the commencement of her new employment and the assignment of a new seniority date. United moved to dismiss the complaint on the ground that Evans' claim for restoration of the seniority she lost in February, 1968 was untimely in that a charge should have been filed with the EEOC within ninety days of that loss, not five years later.

The District Court granted United's motion to dismiss. By memorandum opinion entered on April 9, 1975, the District Court concluded that "Evans . . . has not been suffering from any 'continuing' violation. She is seeking to have this court

merely reinstate her November, 1966 seniority date which she lost solely by reason of her February, 1968 resignation. . . . United's subsequent employment of plaintiff in 1972 cannot operate to resuscitate such a time-barred claim." (Appendix, p. A2.)

On appeal to the Court of Appeals, Evans took the position that the District Court erred in dismissing her Complaint since the violation complained about was allegedly a "current and continuing" violation of the Act; *i.e.*, Evans was presently holding a seniority position as a stewardess inferior to the seniority position she would have had if her 1966-68 seniority had been credited to her on rehire. In short, Evans continued to argue that the Company's action in requiring her to resign in 1968 was an unlawful act of discrimination and that United was and is, in her words, "unlawfully perpetuating the effects of that past discrimination, and is actively enabling that prior discrimination to reach effectively into the present."

Although having no right or entitlement in 1972 to reinstatement of her former employment, Evans claimed that once she was hired and resumed an employment relationship, this necessarily meant that she was then entitled to the seniority lost in 1968 and that no time limits whatsoever applied under the Act to bar her from filing a charge of continuing discrimination relating to the 1968 loss of seniority at any time in the future.

United's position before the Court of Appeals remained the same as presented to the District Court; *i.e.*, the actionable injury to Evans and the violation under the Act was Evans' termination from employment in February, 1968, when she lost her seniority and other benefits associated with that employment. It was from that date that the time limit for filing a charge began to run, and that time had long since expired.

On January 29, 1976, the Court of Appeals in a divided opinion affirmed the District Court's dismissal of the Complaint. The majority of the Court concluded that United's seniority

policy is not discriminatory in itself with respect to sex and that such a policy, which is neutral, cannot be said to perpetuate past discrimination, long since discontinued, in the sense required to constitute a "current" violation of Title VII. The majority of the Court stated (Appendix, pp. A9, A10):

> "If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. A suit based on that termination alone, however, would be barred for failure to file a charge relating to the termination within the statutorily required period."

The dissenting judge disagreed, stating that he believed "continuing discrimination" to be present since failure to credit Evans with back seniority as a current employee gives "collateral effect" to the past act of discrimination.

On February 12, 1976, Evans petitioned the Court for a rehearing. The EEOC shortly thereafter filed a brief as *amicus curiae* in support of that petition. While the petition was pending, this Court issued its decision in the case of *Franks* v. *Bowman Transportation Co.*, ... U. S. ....., 96 S. Ct. 1251, 47 L. Ed. 2d 444, 44 U. S. L. W. 4356 (March 24, 1976). Evans filed a supplemental brief instanter on March 30, 1976 asserting that the *Franks* decision was of controlling guidance in support of her position. On April 6, 1976, the Court of Appeals granted Evans' motion for rehearing and on April 26, 1976 reversed its February 12 decision. Its reversal was based upon its interpretation of the *Franks* decision.

United petitioned the Court for rehearing with a suggestion for rehearing *en banc* on May 10, 1976. That petition was rejected June 7, 1976. United now brings this petition for a writ of certiorari.

REASONS THE WRIT SHOULD BE GRANTED.

The decision of the Seventh Circuit Court of Appeals, if left standing, effectively eliminates the time limitation set forth in Section 706(d) [now 706(e)] of the Act with respect to any claims of discrimination brought by employees, no matter how long after the act of discrimination occurred. If carried to its logical extreme, the decision establishes that the only requirement for a timely claim is that there presently is an employment relationship and that there are some "collateral effects" from a prior act of discrimination. This is true despite the fact that the policy of past discrimination has long since been discontinued.

The decision creates a conflict among the Circuits involving almost identical situations, *e.g.*, *Collins* v. *United Air Lines*, 514 F. 2d 594 (9th Cir., 1975), and represents a complete departure from the plain language of the Act which requires the filing of a discrimination charge within the statutory period after the alleged unlawful act or practice occurred—not years later merely because some collateral or lingering effects remain.

Further, the decision was issued based upon an erroneous interpretation of this Court's decision in the *Franks* case. In *Franks*, this Court held that Section 703(h) of the Act and a bona fide seniority system does not preclude *as a matter of remedy* the grant of retroactive seniority in a *timely filed* class action. The decision in *Evans'*, however, is authority for a different proposition; *viz*, that a claim of discrimination is *timely filed* if a bona fide seniority system carries forward some effects of an otherwise time-barred act of discrimination. The routine operation of a completely neutral date-of-hire seniority system is, therefore, permitted to convert a barred claim of discrimination into a current continuing violation permitting the filing of a charge at any time—a result clearly never contemplated by this Court in *Franks*. For these reasons the writ should be granted.

I.

The Time Limit of Section 706(d).

Section 706(d) of the Act is clear and unambiguous. Prior to the 1972 amendments of the Act, Section 706(d) provided that charges of discrimination in a state which did not have a law banning such discrimination must be filed within ninety days of the act of discrimination.[3] As stated in Section 706(d):

> "A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred. . . ."

The only change made by the 1972 amendments to the quoted language was to enlarge the ninety day period to 180 days.

It is settled law that fulfillment of the above requirement is a jurisdictional prerequisite to the filing of a lawsuit. The Court of Appeals for the Seventh Circuit recognized this in the case of *Choate* v. *Caterpillar Tractor Company*, 402 F. 2d 357, 359 (7th Cir., 1968) wherein the court stated:

> "The requirement that a complainant must invoke the administrative process within the time limitations set forth in Section 706(d) is a jurisdictional precondition to the commencement of a court action."

This Court, in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), agreed when it stated, in the language of Mr. Justice Powell, at p. 47, that the Act:

> ". . . specifies which precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue 42 U.S.C. §§ 2000e-5(b), (e) and (f)".

3. Illinois law did not cover sex discrimination in 1968.

To the same effect is *McDonnell Douglas Corp.* v. *Greene*, 411 U. S. 792, 798 (1973).

Other Circuits are in accord that the time limits in Title VII must be complied with to confer jurisdiction; see, *e.g.*, *Griffin* v. *Pacific Maritime Assoc.*, 478 F. 2d 1118 (9th Cir., 1973), *cert. denied*, 414 U. S. 859; *East* v. *Romine, Inc.*, 518 F. 2d 332, 336 (5th Cir., 1975); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1231 (8th Cir., *en banc* 1975); *Revere* v. *Tidewater Tel. Co.*, 485 F. 2d 684 (4th Cir., 1973) and *Greene* v. *Carter Carburetor Co.*, 532 F. 2d 125 (8th Cir., 1976). Also, *Younger* v. *Glamorgan Pipe & Foundry Co.*, 310 F. Supp. 195 (W. D., Va., 1969) and *Gordon* v. *Baker Protective Services, Inc.*, 358 F. Supp. 867 (N. D., Ill., 1973).

II.

The Act of Discrimination in This Case Occurred in February, 1968.

United's seniority system, as it pertains to United's stewardesses, is a commonly used system whereby stewardesses begin to accrue seniority when they commence work and lose seniority when they leave the company. Seniority rights, along with other perquisites of employment such as wages and fringe benefits, are derived from the employment relationship and the collective bargaining agreement covering the rules, rates of pay and working conditions of stewardesses.

When Evans was first employed by United in November, 1966, she began to accrue seniority and by the time of her resignation in February, 1968, had accrued approximately 16 months' seniority. When she resigned in February, 1968, her seniority terminated, as did the other perquisites of the employment relationship. She then became, employment-wise, a member of the general public and stood on the same footing as

other members of the general public, with the sole exception that she possessed a right, for ninety days, to file a charge with the EEOC protesting her involuntary resignation and the accompanying loss of her seniority, wages, travel passes, etc. At the expiration of ninety days, she possessed no rights whatsoever to challenge the loss of that seniority and other employment benefits.

Before her employment by United as a "new" stewardess in 1972, Evans had no right of reinstatement to her former employment. Similarly, upon her new employment, she had no claim or rights arising out of her former period of employment since her claim to any such rights had long expired. It was not until one year after she was reemployed in 1972 that Evans first claimed that the seniority she accrued between November, 1966 and February, 1968, should be added to her new seniority in 1972.

It is evident that the act of discrimination of which Evans complains occurred in February, 1968, for that is the time she lost the 16 months' seniority which she now claims. As a new employee in 1972, she clearly had no more right to 16 months' added seniority than any other new hire. The only basis on which she claims such added seniority arises from her prior employment—but all claims arising from that period of employment were barred ninety days after her resignation in 1968. Once barred, they could not be resurrected. Yet, this is precisely what the Court of Appeals permitted in this case—solely because of her reemployment.

III.

Evans' Termination of Employment in 1968 Constituted a Final Act and No "Continuing Violation" Is Involved in This Case.

Virtually every court which has had occasion to pass on the question has held that a termination of employment is a "final act" and not a continuing violation. As aptly stated in *Phillips*

v. *Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533, 537-8 (D. C. W. Va. 1972), affirmed without opinion 474 F. 2d 1342 (4th Cir., 1973):

> "It is clear that the unlawful discriminatory practice complained of by plaintiff arises out of the termination of his employment on September 25, 1969. Although plaintiff has alleged a continuing practice of discrimination in his complaint, the record before this court, aside from plaintiff's pleadings, establishes only this single act which could arguably be considered an unlawful employment practice. Plaintiff attempts to avoid the limitation period set forth in Section 706(d) by asserting that the discriminatory practice continued until July 7, 1970, when a negro was hired as his replacement. The record establishes, however, only a single act, occurring on September 25, 1969, which conceivably could form the basis of a charge under the Civil Rights Act of 1964. To hold that the alleged discriminatory termination of plaintiff's employment constituted a continuing practice of discrimination would be to negate reality. • • •"

In *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1234 (8th Cir., 1975), the Court of Appeals for the Eighth Circuit stated that:

> ". . . Termination of employment either through discharge or resignation is not a 'continuing' violation. . . ."

This Court, in *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 95 S. Ct. 1716 (1975), recently recognized that time limits for protesting discharges are counted from the date of discharge. In *Johnson*, the petitioner was discharged on June 20, 1967. Some three and one-half years later, petitioner brought court action under the Civil Rights Act of 1866, 42 U. S. C. § 1981, alleging that he was discriminated against on the basis of his race when discharged. Since the action took place in the State of Tennessee, a one year statute of limitation was applicable to actions brought under 42 U. S. C. § 1981. Rejecting the argument that petitioner's failure to file his suit

within the one year limit was excused because he had filed a timely charge under Section 706 of the Civil Rights Act of 1964, this Court stated, 421 U. S. 462-3:

> "The cause of action asserted by petitioner accrued, if at all, *not later than June 20, 1967, the date of his discharge.* Therefore, in the absence of some circumstance that suspended the running of the limitation period, petitioner's cause of action under § 1981 was *time-barred* after June 20, 1968, over two and one-half years before petitioner filed his complaint." (Emphasis added.)

Significantly, this Court did not hold that petitioner's charge was timely because he "continued" to suffer the effects of his discharge. It was the act of discharge on June 20, 1967 which began the running of the applicable time limit and petitioner's claim was time-barred as a result of his failure to meet that limitation.[4]

In *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806, 808 (7th Cir. 1975) the Court of Appeals stated:

> ". . . If they [plaintiffs] believed that their termination was the result of unlawful discriminatory practices, then a charge was required to be filed within ninety days of that termination. Although the plaintiffs contend that the ninety-day limitation period is no bar because the discrimination is continuous in nature, this is not the case once employment has ended. • • •
>
> . . . For such a former employee the date of discharge or resignation is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date. . . ."

4. See also *Revere* v. *Tidewater Telephone Co.*, 485 F. 2d 684 (4th Cir., 1973) affirming the District Court's denial of jurisdiction for failure of a discharged employee to file his charge with the EEOC within ninety days, *Buckingham* v. *United Air Lines, Inc.*, ... F. Supp. ....., 11 FEP Cases 344, 349 (C. D. Cal. 1975), *Higginbottom* v. *Home Centers, Inc.*, ... F. Supp. ....., 10 FEP Cases 1258, 1260 (N. D. Ohio, 1975); *Doski* v. *M. Goldseher Co.*, ... F. Supp. ....., 11 FEP Cases 468, 470 (D. Md. 1975); *Guy* v. *Robbins & Myers, Inc.*, 525 F. 2d 124 (6th Cir. 1975), *cert. granted* 44 U. S. L. W. 3608 (April 27, 1976) and, in particular, *Kennedy* v. *Braniff Airways, Inc.*, 403 F. Supp. 707 (N. D. Tex. 1975), a case strikingly similar to *Evans*, wherein similar allegations were rejected.

In *Collins* v. *United Air Lines, Inc., supra,* the Court of Appeals for the Ninth Circuit ruled, in a case involving another United stewardess who resigned because of the same "no-marriage" rule, that her lawsuit was barred because of her failure to file charges with the EEOC within ninety days of her resignation.

Except for the fact that Evans was employed as a new stewardess several years after her original employment ended whereas Collins was not, the fact situations in the two cases are almost identical. Both plaintiffs were stewardesses hired by United prior to 1968. Both resigned involuntarily because of United's no-marriage rule—Collins in 1967 and Evans in 1968. Neither filed a charge protesting her termination within ninety days following the termination. In Collins' case, she first filed her charge in 1971, some four years after her termination. In Evans' case, she first filed her charge in 1973, five years after her termination. Both Evans and Collins contended their charges were timely filed because the alleged violations were "continuing" in that United had continually denied to them the privileges and benefits of employment, including prior employment seniority.

The Court of Appeals in *Collins* ruled that her charge was untimely filed since she did not file it within ninety days of her resignation. The Court of Appeals in *Evans* ruled that Evan's charge was timely even though she failed to file it within ninety days of her resignation. Answering the contention that the violation was "continuing", the Court in *Collins* said (514 F. 2d at 596):

> "We cannot accept Collins' argument that her continuing nonemployment as a stewardess resulting from the alleged unlawful practice is itself a violation of the Act. Under the statute, it is the alleged unlawful act or practice—not merely its effects—which must have occurred within the 90 days preceding the filing of charges before the EEOC. Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period."

Clearly, the construction placed upon Section 706(d) by the Court in *Evans* differs from the construction placed upon that same section by the Court in *Collins*. Yet, the sole difference in their situations is that Evans was rehired whereas Collins was not.

The argument that the *effects* of a past act of discrimination rather than the act of discrimination itself constitutes a new or continuing violation of Tilte VII, as rejected in *Collins, supra,* was similarly rejected in a very recent decision of the U. S. District Court for the Southern District of New York. In *Cates* v. *Trans World Airlines,* ..... F. Supp. ....., 13 FEP Cases 201 (S. D., N. Y., July 22, 1976), a pilot employee claimed that he would have had higher seniority benefits and standing but for the fact that his employer had a previous discriminatory policy against hiring black pilots. In 1972, some six years after his employment took place in 1966, he filed a charge with the EEOC for the first time contending, as does Evans here, that he was suffering the current effects of a prior act of discrimination. Specifically, he contended that the failure of TWA to hire him earlier caused him to occupy a lower seniority status and to have fewer benefits than he would have had if hired prior to 1966. The Court rejected the argument that the presence of the continuing "effects" constituted new and separate events of discrimination for which a new charge of discrimination could be timely filed. As stated by the Court (13 FEP Cases at 209):

> ". . . While Whitehead has not alleged that he was denied some benefit traceable to his low seniority status within 180 days of the filing of charges with the EEOC, the Court will construe his complaint so as to make such an allegation. Still, this does not help him state a timely claim for relief. The monthly allocation of seniority benefits pursuant to a facially neutral, date-of-hire seniority system is not the event by which an unlawful employment practice occurs for the purposes of triggering the 180 day limitations period in which to file charges. Any detriments which he may have suffered during this period are not in and of

> themselves fresh acts of discrimination, but are only the derivative effects of the prior policies as carried forward by the seniority system. As a case like Collins makes clear, it is the unlawful *act* or *practice* and not merely its effects which must occur within the 180 day period prior to the filing of charges with the EEOC."

IV.

The Fact That Evans Was Rehired Does Not Resurrect Her Time-Barred Claim—Franks v. Bowman Is Inapposite.

In its initial decision, the Court of Appeals in *Evans* recognized that Evans had been rehired by United before she filed her charge with the EEOC but held that nonetheless her claim was barred by time limits because she had not filed it within the time specified in the Act. As correctly stated by the Court in its initial decision (Appendix, pp. A9, A10):

> ". . . If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. A suit based on that termination alone, however, would be barred for failure to file a charge relating to the termination within the statutorily required period."

The cases discussed above in this brief, including *Collins, supra* and *Terry, supra,* establish that a termination is a final act and is not a continuing violation of the Act. Therefore, as the Court of Appeals correctly held in its initial decision, any claim she had "relating to the termination" would be barred.

After the Court of Appeals received and interpreted this Court's decision in *Franks* v. *Bowman Transportation Co., supra,* it reversed its ruling. In its second and final decision in *Evans,* the Court's reliance on *Franks* was made clear. The Court said (534 F. 2d at 1250):

> "It is in the context of the *Franks* decision that we must consider whether Evans' complaint was filed within 90 days of a violation of Title VII, thus affording jurisdiction

> to the district court. More specifically, the issue is whether . . . [Sec. 706(h)] may be used to interpose a legal bar to Evans' theory that the perpetuation of past discrimination through United's current seniority policy constitutes a continuous violation of her Title VII rights."[5]

The Court of Appeals construed *Franks* as requiring the finding that the operation of a neutral date-of-hire seniority policy to a rehired employee necessarily constitutes a current or continuing violation of the Act if the effects of some prior act of discrimination, a charge as to which act in itself has been time-barred, are carried forward. In so reading *Franks*, the Court of Appeals was in error.

Franks has no application to the real question at issue. *Franks* simply stands for the proposition that a federal court has power to *remedy* an act of discrimination by an award of retroactive seniority to the victim of discrimination *in a situation in which the time limits for filing the complaint are met and the court has jurisdiction. Franks* does not stand for the proposition that a federal court has jurisdiction over claims *in which the time limits of the Act were not met.* In *Franks*, retroactive seniority was authorized for members of a class in which the named plaintiffs had filed a timely charge. In *Evans*, no timely charge was filed. Thus, the District Court in *Evans* did not have jurisdiction over her claim to seniority arising out of her 1966-68 employment. *Franks* is inapposite.

As applied to Evans herself, it is not unreasonable to require that she should have taken timely steps at the time of her termination to protect her rights. It was at that point, in actually losing her job and seniority, that the "act" of discrimination occurred—the date the no-marriage rule was applied to her. It was at that point at which it could reasonably be

5. United never raised the defense that Section 706(h) barred Evans' claim. It had no need to do so since Section 706(d), correctly interpreted, provided a complete defense. The Court of Appeals inserted the Section 706(h) argument as an issue, then decided that issue against United.

expected that she would have sought remedial action if she felt she had been treated unfairly. Moreover, despite the discontinuance of the no-marriage rule by United in November, 1968 and despite her employment as a new hire with new date-of-hire seniority in February, 1972, Evans still failed to file any claim until almost one year later. With ample opportunity to file a claim—with over five years passing since her termination and the loss of her former seniority—and *with no ongoing pattern and practice of discrimination,* it is unreasonable to so loosely construe the "continuing discrimination" concept as to permit Evans to resurrect those claims that were clearly time-barred.

If the Court of Appeals' broad extension of the "continuing discrimination" concept in *Evans* were to receive acceptance, then *any* present employee who was discriminated against in the past could wait indefinitely and file a charge any time in the future—whether five, ten, fifteen or more years later, for he would meet the criteria of *Evans* of being an employee who could be in the position of always suffering the effects of a past action of discrimination. The time limits specified in Section 706 of the Act would be meaningless.

To illustrate: Assume that an employee was discriminatorily laid-off in 1970 and remained in such status for three years. He returns to active employment in 1973 and remains an employee for thirty years thereafter and, at the end of thirty years, first files a charge of discrimination with the EEOC. (Evans waited one year after her return to employment.) He claims a continuing adverse effect on his pay and seniority up to the present time since under the employer's neutral seniority system, one used by almost all employers, he did not receive seniority credit for the period of his lay-off. Under such a seniority system and under the *Evans* decision, his charge presumably would be timely for he would be currently suffering the "collateral effects" (lower rated seniority, pay, etc.) of a past act of discrimination.

Similarly, assuming that an employee was discriminatorily denied a transfer to a higher rated position in 1970, but remains an employee for thirty years thereafter and, at the end of thirty years, first files a charge of discrimination with the EEOC, his charge presumably would be timely under the *Evans* decison for he would be currently suffering the "collateral effects" (lower rated position) of a past act of discrimination.

The above examples are illustrative. The fact, however, is that in such cases and others, any period of limitations for Title VII action under Section 706 would be completely eliminated if the *Evans*' rationale were accepted. Clearly, Congress intended no such result.

Doubtless, every past act of discrimination has some future impact and continuing effects. As applied to Evans, although she now claims that because of her prior termination from employment a continuing adverse effect on her present pay and seniority exists, she is, in truth, suffering from fewer adverse effects than *Collins* or *Terry* who were not rehired and whose claims are barred. *Evans,* thus, results in a situation in which a former employee who is rehired and again begins to draw wages, fringe benefits and the like is given a right to the benefits of her past employment despite her five year delay in filing a charge, whereas a former employee who is not hired and remains adversely affected has no such rights.

The net effect of the Court of Appeals' final decision in *Evans* is to create *different* rights under the Act for former employees who are rehired and former employees who are not rehired. Those who are not rehired lose any claims based upon their former employment relationship unless they asserted such claims within 90 days as provided in Section 706(d). Those who are rehired have the right, under the *Evans* rationale, to assert such claims even though such claims were barred by Section 706(d) several years prior to rehire. In short, *Evans* means that the act of rehiring a former employee resurrects or revitalizes a claim already barred by time limits.

This result is illogical and without support in the law. It obviously will not foster reemployment of former employees by employers, but will discourage reemployment.

Section 706(d) draws no distinction between claims by present employees and claims by former employees. Nothing in Section 706(d) permits claims to be asserted by present employees unless those claims were filed within the ninety day period from the date the act of discrimination occurred. In fact, Section 706(d) bars *all* claims not filed within ninety days, whether by present employees or not. There is no valid basis in the Act from which to draw a distinction in the application of Section 706(d) between present and former employees.

The error in *Evans* is that the Court of Appeals confuses the continuing *effects* of an act of discrimination with the *act* of discrimination itself. It does so in a situation wherein the act of discrimination was a definite and completed act, where there was a complete break in the employment relationship, where the underlying discriminatory policy has long been discontinued and there is no ongoing pattern or practice of discrimination, and where the aggrieved employee had more than ample opportunity to timely assert a claim but chose not to do so. It represents authority for the proposition that claims under Title VII, although previously barred by the time limitations under the Act, can at any time be "unbarred" by the mere fact of subsequent employment and the application of a completely neutral employment policy, such as United's date-of-hire seniority system. As a result, it creates a license for an aggrieved person, irrespective of when the alleged discrimination occurred, to wait years before asserting a claim of discrimination, as did Evans. It eliminates any period of limitations for Title VII actions.

CONCLUSION.

Evans is illogical, contrary to the language of Section 706(d) of the Act and the intent of Congress. It is contrary to the ruling of the Court of Appeals for the Ninth Circuit in *Collins*

and contrary to those decisions which hold that filing of a charge with the EEOC within the time limits set forth in the Act is a jurisdictional prerequisite to the filing of a lawsuit.

Evans confuses the "effects" of an act of discrimination with the "act" of discrimination itself and by so doing would permit any current employee who has at any time in the past been the victim of an "act" of discrimination to have a current timely charge relating to that act since that employee can be in the situation of perpetually suffering the "effects" of the act, no matter how long ago the act occurred—whereas a non-rehired former employee who also was the victim in the past of the same act of discrimination and is currently suffering the "effects" of that act (unemployment) has no similar right.

Evans misconstrues *Franks* and interprets it incorrectly as authorization to remedy time-barred claims of discrimination rather than as authorization to remedy timely claims of discrimination. *Evans* improperly permits an employee who is rehired to resurrect a barred claim, even though there is no authorization in the law to permit such action.

Were *Evans* permitted to stand, employers would be discouraged from rehiring former employees for fear that barred claims of past discrimination would be resurrected, as indeed occurred in Evans' case.

For the foregoing reasons, United respectfully prays that a writ of certiorari be issued.

Respectfully submitted,

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Dated: September 3, 1976.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois
Eastern Division.

CAROLYN J. EVANS, *Plaintiff,*
vs.
UNITED AIR LINES, INC., *Defendant.*
No. 74 C 2530

MEMORANDUM OPINION.

Plaintiff employee has filed this action against defendant employer under Title VII of the Civil Rights Act of 1964 to seek redress for defendant's alleged illegal sex discrimination. Plaintiff complains that she was forced to resign her position as a stewardess in February, 1968, pursuant to United's "no marriage" rule for female flight personnel. In November, 1968, United ended its "no marriage" policy, and in February, 1972, plaintiff was hired by United as a stewardess. On February 21, 1973, plaintiff, for the first time, filed a charge of discrimination against United with the EEOC. In response, the EEOC issued a right-to-sue letter to plaintiff, who then filed this action.

Pursuant to F. R. Civ. P. 12(b)(1), defendant has moved to dismiss the complaint on the ground that this court is without jurisdiction in this case under Title VII because of plaintiff's failure to file charges with the EEOC within a certain specified period of time from the date of the alleged unlawful discrimination.

Prior to the 1972 Amendments to the Act, when plaintiff was forced to resign her position, § 2000e-5(d) provided that

in order to bring an action under this section, a person must file a charge with the EEOC within ninety days after the occurrence of the alleged unlawful employment practice.[1] Plaintiff waited five years before filing her charge. The requirement that one complaining of discrimination on the basis of sex must invoke the administrative process within the time limitations set forth in 42 U. S. C. § 2000e-5 is a jurisdictional precondition to the commencement of a court action. *Choate* v. *Caterpillar Tractor Company*, 402 F. 2d 357, 359 (7th Cir. 1968). Plaintiff agrees, but argues that in this case there exists a "continuing violation" brought about by United's current refusal to credit plaintiff with any seniority prior to her employment in February, 1972. Plaintiff asserts that by defendant's denial of her seniority back to the starting date of her original employment in 1966, United is currently perpetuating the effect of past discrimination.

Plaintiff, however, has not been suffering from any "continuing" violation. She is seeking to have this court merely reinstate her November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation. The fact that that resignation was the result of an unlawful employment practice is irrelevant for purposes of these proceedings because plaintiff lost her opportunity to redress that grievance when she failed to file a charge within ninety days of February, 1968. United's subsequent employment of plaintiff in 1972 cannot operate to resuscitate such a time-barred claim.

Accordingly, defendant's motion to dismiss is granted, and the complaint is hereby dismissed.

ENTER:

/s/ BERNARD M. DECKER,
United States District Judge.

Dated: April 9, 1975.

1. By Act of March 24, 1972, Pub. L. 92-261, § 4(a), 86 Stat. 103, former subsection (d) was relettered to (e), and the time for filing charges was extended from ninety days to one hundred and eighty days.

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1481

CAROLYN J. EVANS,

Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois.

74-C-2530

BERNARD M. DECKER, *Judge*

Argued November 6, 1975—Decided January 29, 1976

Before CUMMINGS, ADAMS,* and SPRECHER, *Circuit Judges.*

PER CURIAM:—This suit was brought by Carolyn J. Evans, under Title VII of the Civil Rights Act of 1964,[1] to recover seniority and back pay that she claims she has lost because of her separation from employment with United States Air Lines. The complaint alleged that United discriminated against Evans

* The Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

1. 42 U. S. C. § 2000e *et seq.* (Supp. III 1973).

in February, 1968, when United, by reason of Evans' marriage forced her to resign her employment as a stewardess, and that the effect of the termination is a continuing one, perpetuated by the current policies of United which for seniority purposes consider only continuous time in service.

Evans was employed by United as a stewardess from November, 1966 until February, 1968, when she involuntarily resigned. During that period it was the policy of United that marriage disqualified a woman from continuing her employment as a stewardess. On November 7, 1968, United discontinued its policy of requiring stewardesses to remain unmarried,[2] and on February 16, 1972, Evans was again hired as a new employee of United. She was provided stewardess training for newly hired employees which she completed on March 16, 1972.

Evans' charge of discrimination was filed with the EEOC on February 21, 1973—five years after her termination from employment, and more than four years after United eliminated its no-marriage rule. She had not filed any prior charge of discrimination with the EEOC, or with any other governmental agency, or in any way challenged United's no-marriage rule.

2. United, by letter agreement of November 7, 1968 with a collective bargaining agent, agreed to reinstate those stewardesses who had been terminated under the no-marriage rule and who had filed charges or grievances. Every stewardess desirous of reinstatement was required to make application within thirty days of notification of this agreement. Evans did not qualify for reinstatement under this agreement because she had not filed a prior charge of discrimination against United with the EEOC or any state agency, nor had she filed a grievance under the applicable collective bargaining agreement.

By an October 16, 1969 letter agreement United undertook to reinstate those stewardesses who had transferred to ground positions because of the no-marriage rule and who were employed by United on that date. Evans acquired no right under the letter agreement of October 16, 1969 inasmuch as she had not transferred to a ground position and was not an employee with United as of October 16, 1969.

United's no-marriage policy for stewardesses was held unlawfully discriminatory in Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 3 FEP Cases 621 (7th Cir.), *cert. denied*, 404 U. S. 991 (1971).

United took the position that a timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to filing a civil action under Title VII. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357, 359, 1 FEP Cases 431, 433, 69 LRRM 2486 (7th Cir. 1968). Therefore it moved to dismiss the complaint on the ground that Evans had failed to file a charge with the EEOC within ninety days of the alleged unlawful practice[3] which occurred in February, 1968, United claimed, when Evans was forced to resign as a stewardess and her employment and seniority were terminated. The district court granted United's motion to dismiss the complaint on the ground that plaintiff "has not been suffering from any 'continuing' violation" and is "seeking to have the court merely reinstate the November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation."

Evans appeals and we affirm.

I.

Evans claims that a current employment practice or policy, though facially neutral, is unlawful if by its operation it enables prior discrimination to reach into the present, and thus prolongs the effect of such prior discrimination. She also contends that where the challenged employment practice is current and continuing, the usual procedural requirement of Title VII, that an EEOC charge "be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," is inapplicable. Evans appears to argue that where the practice is a persistent one, a charge filed at any time during the practice's continuance is *ipso facto* timely.

Her charge would not be timely and the jurisdictional prerequisites to a civil action would not be fulfilled under the Civil

3. Prior to the 1972 Amendments of the Civil Rights Act, 42 U. S. C. § 2000e-5(e) provided that in order to bring an action under this section, a person must file a charge with the EEOC within ninety days after the occurrence of the alleged unlawful employment practice.

Rights Act, Evans concedes, unless her theory of a continuing violation is valid. Evans also concedes that United's current seniority policy is facially neutral with respect to sex,[4] and she does not contend that United still discriminates against females by reason of any current no-marriage policy. She does maintain however, that United's discriminatory termination in February, 1968 caused her to lose her seniority and, as a result of both that termination and United's on-going seniority policy, she suffers a discriminatory loss of seniority and related benefits, including pay, to the present date.

On the other hand, United asserts that the only legally cognizable injury to Evans was her termination of employment and seniority in February, 1968. That she was subsequently hired as a new employee cannot alter the fact, United asserts, that Evans lost her former seniority when she was terminated. It was this termination, in 1968, which began the running of the time limit with respect to the loss of her employment and associated benefits, according to United's theory of the case.

United argues that if a discriminatory act is considered to continue for so long as there is some lingering effect, every alleged discriminatory act could be litigated at any time. An alleged discrimination, United reasons, would never be final, despite the limitation period under section 2000e-5(e), since there might always be some lingering effects—monetary or otherwise.

II.

In *Collins* v. *United Airlines*, 541 F. 2d 594 (9th Cir. 1975), decided after the judgment here was entered by the district court, the plaintiff, a stewardess for United, was required

4. United's policy of crediting toward seniority only *continuous* time in service works to the disadvantage of rehired employees. A new employee who was hired in the interim between the rehired employee's termination and rehiring will have greater seniority than the rehired emlpoyee, although the new employee may have less total time in service. This policy would seem to be neutral, however, as between male and female employees.

to resign in 1967 because of United's no-marriage rule. In 1971, more than four years after her resignation, she filed a charge with EEOC, contending like Evans, that she had been terminated improperly under Title VII. Collins argued that her complaint was timely filed because the alleged violation was a continuing one, since United had steadfastly denied to her all employment privileges, including her prior seniority. The district court dismissed on the basis of untimeliness. In affirming the district court, the Court of Appeals for the Ninth Circuit stated:

> We cannot accept Collins' argument that her continuing non-employment as a stewardess resulting from the alleged unlawful practice is itself a violation of the Act. Under the statute, it is the alleged unlawful act or practice—not merely its effects—which must have occurred within 90 days preceding the filing of charges before the EEOC. Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period.

The major difference between the *Collins* case and the case at hand is that Evans was re-employed as a stewardess several years after her original employment and her original cause of action had ended, whereas Collins was not re-employed. Evans argues that the violation here is a continuing one because United's current practice is to deny her seniority credit for the period prior to 1972.

Evans would have this Court find a present discrimination when the adverse effect of a past discrimination is still felt because of a current policy of the employer, even though such current policy is not discriminatory with respect to sex.[5] This is congruent with the thesis that the Ninth Circuit specifically

5. Such a holding, however, might well discourage an employer from re-hiring a worker against whom it had discriminated previously. This reluctance would stem from both the direct burden of additional costs associated with such an employee and the fear of disruption of the employer's relations with other employees who might consider themselves to be unfairly disadvantaged, in terms of the regular and neutral seniority program, relative to the rehired employee.

declined to accept in *Collins* when it stated that "the alleged unlawful act or practice—not merely its effects— . . . must have occurred within [the statutory period] preceding the filing of charges before the EEOC."[6]

In Waters v. Wisconsin Steel Works, 502 F. 2d 1309 (7th Cir. 1974), *petition for cert. filed*, 44 LW 3037 (U. S. Feb. 24, 1975 (No. 74-1064), this Court adopted essentially the same rationale that the Ninth Circuit employed in *Collins*. Wisconsin Steel had engaged in racially discriminatory hiring practices, but in 1964 it began to hire black bricklayers, including Waters, who was hired in July. When business slackened in September, 1964, Waters was among those laid off, pursuant to a "last hired, first fired" seniority system. Waters contended that this seemingly neutral policy of last hired, first fired served to perpetuate past discrimination because recently hired blacks were disadvantaged relative to whites who might not have had greater seniority but for the prior discriminatory hiring practices. Waters' argument was rejected by this Court, which stated:

> Wisconsin Steel's employment seniority system embodying the "last hired, first fired" principle of seniority is not

6. *Accord*, Buckingham v. United Air Lines, 11 FEP Cases 344 (C. D. Cal. 1975) (dictum), decided independently of *Collins*. In *Buckingham* eight stewardesses alleged discriminatory terminations or transfers to ground positions by United pursuant to its no-marriage policy. The stewardesses filed charges within 90 days of the agreement between their union and United rescinding the "no-marriage" policy, see note 2 supra, but more than 90 days after the allegedly discriminatory transfers and terminations. The stewardesses contended that the agreement, which restored no rights to them, perpetuated the effects of the prior discrimination and was, therefore, discriminatory in itself. The district court decided that the transfers and terminations in question were not discriminatory in fact, and also concluded that:

> [e]mployer action . . . such as the termination or transfer of an employee . . . constitutes a 'completed act' at the time it occurs, and unless a charge of discrimination is filed with the Equal Employment Opportunity Commission within the completed time period following the completed act, an action under Title VII is barred.

11 FEP Cases at 349.

> of itself racially discriminatory [n]or does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII.[7]

The *Waters* decision adjudicated more issues than this one. But the seniority issue was not insignificant in *Waters* and this Court appears to have concluded that detriments that stem from the interaction of a prior discrimination and a seniority policy that is not discriminatory in itself cannot be deemed to be proximately caused by the prior discrimination.

The holding in *Waters* must inform our decision here.[8] United's seniority policy in itself is not discriminatory with respect to sex.[9] A policy which is neutral cannot be said to perpetuate past discriminations in the sense required to constitute a current violation of Title VII. If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. A suit based on that termina-

7. 502 F. 2d at 1318. This holding is distinct from another portion of Waters in which a "present perpetuation of the racial discrimination of the past" was found. There an amendment to the regular seniority policy, which favored only eight specific whites who had previously worked for the company but who had cut all ties with the firm by accepting severance pay, was determined to be an expression of a discriminatory policy in the circumstances of the case. 502 F. 2d at 1320-21, *petition for cert. filed sub nom.* Bricklayers and Stone Masons, Local 21 v. Waters, 44 LW 3038 (U. S. Apr. 25, 1975) (No. 74-1350). Unlike the Wisconsin Steel Works, however, United does not appear to have deviated from its regular, and neutral, seniority policy in its dealings with Evans.

8. But see Tippett v. Liggett & Meyers Tobacco Co., 316 F. Supp. 292 (N. D. N. C. 1970); EEOC Dec. No. 71-413, 3 FEP Cases 233 (1970). Two of the cases emphasized by Evans—Burwell v. Eastern Airlines, 394 F. Supp. 1361, 10 FEP Cases 882 (E. D. Va. 1975), and Marquez v. Omaha District Sales Office, 440 F. 2d 1157, 3 FEP Cases 275 (8th Cir. 1971)—involved continuing employer policies discriminatory in themselves, whereas in the present case the current seniority policy of United is neutral on its face with regard to sex.

9. See note 4 *supra* and accompanying text.

tion alone, however, would be barred for failure to file a charge relating to the termination within the statutorily required period.

Accordingly, the judgment of the district court is affirmed.

CUMMINGS, *Circuit Judge* (dissenting):—With due respect, I dissent. The gravamen of the complaint is that United has continued to fail to credit plaintiff with prior seniority. This is a current practice of defendant and results in plaintiff's receiving less seniority than male stewards hired between her February 1968 illegally forced resignation and her February 1972 reemployment. The majority, incorrectly I believe, holds that this suit, filed in 1973, is barred by the pertinent statute of limitations, 42 U. S. C. § 2000e-5(e).[1] However, as we held in *Cox* v. *United States Gypsum Company*, 409 F. 2d 289, (7th Cir. 1969), and again in *Bartmess* v. *Drewrys U. S. A., Inc.*, 444 F. 2d 1186, 1188 (7th Cir. 1971), certiorari denied, 404 U. S. 939, the limitation contained in what is now Section 2000e-5(e) is no bar when a continuing practice of discrimination is being challenged.

The issue then is whether defendant's policy is an act of continuing discrimination. In analyzing this issue the threshold question the court should ask is: does Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e et seq.) impose an obligation upon the employer which was allegedly violated by the challenged policy at the time plaintiff instituted this action? To determine whether there was a violation, it should next consider whether the challenged facially neutral policy gives collateral effect to a past act of discrimination, and, if so, whether the past act of discrimination is the proximate cause of the disparity complained of by plaintiff. If these conditions have been met, the plaintiff has proven discrimination in violation of Title VII. See *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d

1. The predecessor Section 2000e-5(d) required that a charge be filed with the EEOC within 90 days after the occurrence of the unlawful practice. In 1972, the period was extended to 180 days.

211, 236 (5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354 (8th Cir. 1973).

Applied to the facts of this case, this analysis inexorably results in the conclusion that United's failure to credit plaintiff with back seniority is a current act of discrimination. Clearly, Title VII requires employers to determine an employee's seniority on a non-discriminatory basis. See 42 U. S. C. § 2000e2(h); *United States* v. *N. L. Industries, supra.* Because plaintiff's seniority is being measured from the date of her re-employment, defendant's policy gives collateral effect to its past act of discrimination, *viz.*, plaintiff's illegal termination. That 1968 wrongful act is the proximate cause of the existing disparity between plaintiff's wages and working conditions and those of male stewards hired between February 1968 and February 1972. Defendant is thus presently perpetuating the effects of its past discrimination. Plaintiff's charge was therefore timely filed and the district court had jurisdiction of her action. *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 359 (7th Cir. 1968).

The Equal Employment Opportunity Commission considered plaintiff's charge to be timely, and its interpretation of the time limitation contained in 42 U. S. C. § 2000e-5(e) deserves deference. *Cox* v. *United States Gypsum Company*, 409 F. 2d 289, 291 (7th Cir. 1969). This view of timeliness has judicial and administrative support.

In *Burwell* v. *Eastern Air Lines, Inc.*, 394 F. Supp. 1361, 1367, (E. D. Va. 1975) stewardess Burwell was terminated for pregnancy. Seven months later she was reinstated with loss of seniority. Although Eastern had changed its maternity policy prior to suit, Judge Merhige held that her EEOC charge almost three years after her return to Eastern was a timely filing with the EEOC because of her continuing loss of seniority. His reasoning is similar to that adopted earlier by the Commission in a case on all fours with the one at bar. EEOC Doc No. 71-413, 3 FEP Cases 233 (1970). We should pay heed to its construction of Title VII (*Griggs* v. *Duke Power Co.*, 401 U. S.

424, 434, *Choate* v. *Caterpillar Tractor Co.*, *supra* 402 F. 2d at 360) and therefore require United to bridge plaintiff's seniority. See *Marquez* v. *Omaha District Sales Office*, 440 F. 2d 1157, 1159-1160 (8th Cir. 1971); *Tippett* v. *Liggett & Myers Tobacco Co.*, 316 F. Supp. 292, 295-296, (M. D. N. C. 1970); *Healen* v. *Eastern Air Lines*, 8 FEP Cases 917 (N. D. Ga. 1973).

Defendant maintains a present bias by enabling its past bias to reach into the present through its seniority practice. United should not be able now to penalize the victim of its prior discrimination.[2]

The cases relied on by the majority are readily distinguishable. In *Collins* v. *United Airlines*, 514 F. 2d 594 (9th Cir. 1975), plaintiff sought reinstatement several years after she had been terminated pursuant to United's "no marriage" rule. The alleged continuing discrimination in *Collins* was the failure to rehire plaintiff. Title VII, however, imposes no obligation on the employer to hire anyone unless the refusal is motivated by discrimination. There was no evidence in *Collins* that the decision not to rehire the plaintiff was based at all upon the past act of discrimination. In *Buckingham* v. *United Airlines*, 11 FEP Cases 344, 345 (C. D. Cal. 1975), the court specifically found that plaintiffs' terminations or transfers were not caused by the no marriage rule or any other act of discrimination. Finally, *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309 (7th Cir. 1974), is inapposite. In that case, the plaintiffs failed to show that the prior discrimination was the proximate cause of their layoffs.

I would reverse.

2. The majority's fear that a finding of continuing discrimination in this case would discourage the re-employment of wronged employees is not warranted. After her termination, the plaintiff here filed a grievance with the Union. United's decision to rehire her resulted from Union pressure, which would have been applied without regard to our holding in this case.

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1481

CAROLYN J. EVANS,

Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division 74-C-2530

BERNARD M. DECKER,

Judge.

On Petition for Rehearing

ARGUED NOVEMBER 6, 1975—DECIDED APRIL 26, 1976

Before CUMMINGS, ADAMS* and SPRECHER, *Circuit Judges.*

ADAMS, *Circuit Judge.* This suit was brought by Carolyn J. Evans, under Title VII of the Civil Rights Act of 1964,[1] to recover seniority and back pay that she allegedly lost because of her separation from employment with United Air Lines. The complaint claims that United discriminated against Evans in

* The Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

1. 42 U. S. C. § 2000e *et seq.* (Supp. III 1973).

February, 1968, when United, by reason of Evans' marriage, forced her to resign her employment as a stewardess. She also asserts, however, a continuing discrimination against her as a result of the current application of United's seniority policies, which consider only continuous time-in-service and thereby perpetuate the adverse effects of the original discriminatory discharge.

Evans was employed by United as a stewardess from November, 1966 until February, 1968, when she involuntarily resigned. During that period it was the policy of United that marriage disqualified a woman from continuing her employment as a stewardess. On November 7, 1968, United discontinued its policy of requiring stewardesses to remain unmarried,[2] and on February 16, 1972, Evans was again hired as a new employee of United. She was provided stewardess training for newly hired employees, which she completed on March 16, 1972.

Evans filed a charge of discrimination with the EEOC on February 21, 1973—five years after her termination from employment, and more than four years after United eliminated its no-marriage rule. She had not filed any prior charge of discrimination with the EEOC, or with any other governmental agency, or in any way challenged United's no-marriage rule.

2. United, by letter agreement of November 7, 1968 with a collective bargaining agent, agreed to reinstate those stewardesses who had been terminated under the no-marriage rule and who had filed charges or grievances. Every stewardess desirous of reinstatement was required to make application within thirty days of notification of this agreement. Evans did not qualify for reinstatement under this agreement because she had not filed a prior charge of discrimination against United with the EEOC or any state agency, nor had she filed a grievance under the applicable collective bargaining agreement.

By an October 16, 1969 letter agreement, United undertook to reinstate those stewardesses who had transferred to ground positions because of the no-marriage rule and who were employed by United on that date. Evans acquired no right under the letter agreement of October 16, 1969 inasmuch as she had not transferred to a ground position and was not an employee with United as of October 16, 1969.

United's no-marriage policy for stewardesses was held unlawfully discriminatory in *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir.), *cert. denied*, 404 U. S. 991 (1971).

United took the position that a timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to filing a civil action under Title VII. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357, 359 (7th Cir. 1968). Therefore it moved to dismiss the complaint on the ground that Evans had failed to file a charge with the EEOC within ninety days of the alleged unlawful practice[3] which occurred in February, 1968, United claimed, when Evans was forced to resign as a stewardess and her employment and seniority were terminated.

The district court granted United's motion to dismiss the complaint on the ground that plaintiff "has not been suffering from any 'continuing' violation" and is "seeking to have the court merely reinstate the November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation."

Evans brought this appeal. After argument, the Court affirmed the dismissal by the trial court, relying upon an interpretation of *Waters* v. *Wisconsin Steel Works*.[4] Petitions for rehearing by the panel and *en banc* were filed. Pending the consideration of those petitions, the Supreme Court decided *Franks* v. *Bowman Transportation Co.*[5] In view of the Supreme Court's decision, rehearing was granted by the panel on April 6, 1976. We now reverse and remand.

I.

Evans claims that a current employment practice or policy, though facially neutral, is unlawful if by its operation it enables prior discrimination to reach into the present, and thus prolongs

3. Prior to the 1972 Amendments of the Civil Rights Act, 42 U. S. C. § 2000e-5(e) provided that in order to bring an action under this section, a person must file a charge with the EEOC within ninety days after the occurrence of the alleged unlawful employment practice.

4. 502 F. 2d 1309 (7th Cir. 1974), *pet. for cert. filed*, 44 U. S. L. W. 3037 (U. S., Feb. 24, 1975) (No. 74-1064).

5. 44 U. S. L. W. 4356 (U. S. Mar. 24, 1976)

the effect of such discrimination. She also contends that where the challenged employment practice is current and continuing, the usual procedural requirement of Title VII, that an EEOC charge "be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," is inapplicable. Evans appears to argue that where the practice is a persistent one, a charge filed at any time during the continuance of the practice is *ipso facto* timely.

Her charge would not be timely and the jurisdictional prerequisites to a civil action would not be fulfilled under the Civil Rights Act, Evans concedes, unless her theory of a continuing violation is valid. Evans also concedes that United's current seniority policy is facially neutral with respect to sex,[6] and she does not contend that United still discriminates against females by reason of any current no-marriage policy. She does maintain however, that United's discriminatory termination in February, 1968 caused her to lose her seniority and, as a result of that termination in combination with United's on-going seniority policy, she suffers a discriminatory loss of seniority and related benefits, including pay, to the present date.

On the other hand, United asserts that the only legally cognizable injury to Evans was her termination of employment and seniority in 1968. In this respect, United's argument would appear to rest, *sub silentio,* on the protection afforded bona fide seniority systems by section 2000e-2(h). That section provides:

> Notwithstanding any other provision of this sub-chapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system. . . .

6. United's policy of crediting toward seniority only *continuous* time-in-service works to the disadvantage of rehired employees. A new employee who was hired in the interim between the former employee's termination and rehiring will have greater seniority than the rehired employee, although the new employee may have less total time-in-service. This policy would seem to be neutral, however, as between male and female employees.

Since it is agreed that United's continuous-time-in-service seniority system is facially neutral with regard to sex, the present application of the seniority policy to Evans is not a violation of Title VII, according to United. Rather, in their view of the case, any actionable injury to Evans stems from her termination in February, 1968, whereby she lost her initial seniority. And it was from such date that the time limit began to run, and has long-since expired, with respect to any disadvantages in employment-related benefits.

United argues that if a discriminatory act is considered to continue for so long as there is some lingering effect, every alleged discriminatory act could be litigated at any time. A discrimination, United reasons, would never be final, despite the limitation period under section 2000e-5(e), since there might always be some lingering effects—monetary or otherwise.

II.

The Supreme Court addressed the scope of the neutral-seniority-policy defense set forth in section 2000e-2(h) in *Franks* v. *Bowman Transportation Co.*[7] The Court in *Franks* was asked to determine whether Section 2000e-2(h) (section 703(h) of the Civil Rights Act of 1964) precluded the grant of retroactive seniority as a form of relief to job applicants who had not been hired because of racial discrimination. It held that such relief was appropriate, despite a facially neutral seniority policy, where the individual complainants could prove that they had been the actual victims of discriminatory hiring practices.[8] The decision was predicated upon the Supreme Court's conclusion

7. 44 U. S. L. W. 4356 (U. S., Mar. 24, 1976.)

8. *Id.* at 4359, 4361, 4363. This Court's decision in *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309 (7th Cir. 1974), *pet. for cert. filed.* 44 U. S. L. W. 3037 (U. S., Feb. 24, 1975) (No. 74-1064), would not appear to be to the contrary. In *Waters,* the employees do not seem to have established a causal linkage between their seniority status, which resulted in their lay-offs, and specific acts of discrimination directed at them personally.

that section 2000e-2(h) was intended to protect only those seniority rights that were established prior to the effective date of Title VII in 1965:[9]

> [W]hatever the exact meaning and scope of § 703(h) in light of its unusual legislative history and the absence of the usual legislative materials, . . . it is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.

As the Supreme Court observed, Congress is well aware that employment discrimination is a "complex and pervasive phenomenon."[10] The House report on the Equal Employment Opportunity Act Amendments of 1972 notes that

> Experts familiar with the subject generally describe the problem in terms of "systems" and "effect" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority in lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. . . . Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance.[11]

The Supreme Court reiterated in *Franks* that "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity. . . ."[12]

"[O]ne of the central purposes of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination," the Court said.[13] Therefore, it concluded that

9. *Id.* at 4360.

10. *Id.* at 4361 n. 21.

11. H. Rep. No. 92-238, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U. S. Code, Cong. & Admin. News 2137, 2144.

12. 44 U. S. L. W. at 4360.

13. *Id.*

"[a]dequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position of the seniority system that would have been his had he been hired at the time of his application."[14]

III.

It is in the context of the *Franks* decision that we must consider whether Evans' complaint was filed within 90 days of a violation of Title VII, thus affording jurisdiction to the district court. More specifically, the issue is whether section 2000e-2(h) may be used to interpose a legal bar to Evans' theory that the perpetuation of past discrimination through United's current seniority policy constitutes a continuing violation of her Title VII rights.

A seniority policy that credits only continuous time-in-service necessarily has an adverse impact on rehired employees who have more total time-in-service, but less continuous time-in-service, than newly hired employees. This disadvantaged class of rehired employees may include employees who were rehired subsequent to terminations that resulted from prior discriminatory practices. Evans claims to be an employee of the latter type.

It is apparent that United's continuous-time-in-service seniority program may put an employee who has been discharged and later rehired into an inferior seniority position than would have been the case if the employee had not been discharged and, thereby, perpetuates some of the disadvantages resulting from the prior discharge. If the prior discharge was itself a discriminatory one, then United's seniority policy is an instrument that extends the impact of past discrimination, albeit unintentionally. Consequently, the present application of United's seniority policy is deemed to be discriminatory. It has been held in a number of instances that a facially neutral seniority policy may

14. *Id.* at 4361.

be in violation of Title VII if its effect is to perpetuate the disadvantages accruing from prior discrimination.[15]

The teaching of *Franks* confirms these holdings. Section 2000e-2(h) must be understood as relatively narrow, although necessary, exception to the Congressional intent to prohibit all practices of whatever form that create inequalities. It applies only to seniority rights vesting before the 1965 effective date of Title VII. United's seniority program, however, transmits into the present the disadvantages allegedly resulting from a 1968 discrimination. In these circumstances, section 2000e-2(h) cannot be used to erect a legal bar to Evans' claim that she is the victim of a current discrimination as a result of a present seniority practice that imposes upon her the effects of a past employment discrimination by United.

For the above reasons, we conclude that Evans' complaint, having been filed during the pendency of the alleged discrimination, was not time-barred. Accordingly, we reverse and remand the cause to the district court for action consistent with this opinion.

15. *Acha* v. *Beame*, ... F. 2d ..... (2d Cir. 1976); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 236 (5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354 (8th Cir. 1973); *Tippett* v. *Liggett & Meyers Tobacco Co.*, 316 F. Supp. 292 (M. D. N. C. 1970); *Healen* v. *Eastern Air Lines*, 8 FEP Cases 917 (N. D. Ga. 1973); EEOC Dec. No. 71-413, 3 FEP Cases 233 (1970). *See Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971), where the Supreme Court declared:

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit
Chicago, Illinois 60604.

—June 7, 1976

Before:

Hon. WALTER J. CUMMINGS, *Circuit Judge*,
Hon. ARLIN M. ADAMS,* *Circuit Judge*,
Hon. ROBERT A. SPRECHER, *Circuit Judge*.

No. 75-1481.

CAROLYN J. EVANS,
Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition of the appellee, United Air Lines, Inc., for a hearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellee for a rehearing in the above-entitled appeal be, and the same is hereby denied.

* The Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

SECTION 706(d) OF THE CIVIL RIGHTS ACT OF 1964.*
[42 U. S. C. § 2000e-5(d)]

Sec. 706(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

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* Prior to 1972 amendments.